APPENDIX A

[Excerpts from decision of Administrative Law Judge]

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CASE 6-CA-27873, ET AL.

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., ITS OPERATING REGIONAL OFFICES, WHOLLY OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM, AND/OR ITS WHOLLY OWNED SUBSIDIARY BEVERLY ENTERPRISES—PENNSYLVANIA, INC., D/B/A BEVERLY MANOR OF MONROEVILLE, ET AL.

AND

DISTRICT 1199P, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC, ET AL.

DECISION

Statement of the Case

Robert T. Wallace, Administrative Law Judge: These cases were tried at 6 locations in Pennsylvania (Scranton, Franklin, Harrisburg, Pittsburgh, Johnstown and Reading) on 20 days between July 15, 1996 and May 6, 1997.

The original charge was filed on February 13, 1996[1] by District 1199P, Service Employees International Union, AFL-CIO, CLC. Thereafter numerous additional charges[2] were filed by that union and by two other SEIU affiliated unions (Local 585 and Local 668). A Consolidated Complaint against the captioned Respondents issued on May 9 and this was succeeded on June 19 by an Amended Consolidated Complaint, and the latter was amended up to and through conclusion of hearings.[3]

At issue is whether Respondents violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act by unilaterally changing terms and conditions of employment, by: refusing the Unions' information requests, refusing to bargain over specific issues, delaying grievance processing, and by-passing the Locals and dealing directly with employees. Also, there are numerous allegations of coercive and discriminatory conduct

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[1] All dates are in 1996 unless otherwise indicated.

[2] 6—CA-28061, 28073, 27874, 28046, 28075, 28049, 28074, 27876, 28013, 28050, 27877, 28014, 28015, 27878, 28020, 28054, 27879, 28019, 28047, 27880, 28023, 28045, 27881, 28024, 28057, 27882, 28025, 28052, 27883, 28026, 28051, 27884, 28058, 28076, 27889, 28012, 28059, 27890, 28048, 27891, 27892, 28060, 28077, 27893, 28079, 27894, 28053 and 28081.

[3] In its brief General Counsel seeks further to amend the complaint to delete paragraph G6 and to include 4 additional charges. Respondents opposed the latter. The requested deletion is granted. Inclusion of additional charges is denied. No adequate reason is advanced as to why inclusion was not sought before close of the hearing. Failure to do so precluded Respondents from responding either at trial or on brief. In any event, procedural fairness would require reopening for that purpose and I see no compelling need for the attendant delay in disposition of these proceedings. *United Artists Theater*, 277 NLRB 115, 130 (1985).

in violation of Section 8(a)(1) and (3) of the Act, including failing promptly to reinstate approximately 450 employees who engaged in a three day strike beginning on April 1.

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VII. Sufficiency of Strike Notices Under Section 8(g)

Section 8(g) was added to the Act in 1974 as part of the Nonprofit Hospital Amendments that extended coverage to include health care institutions. It provides, *inter alia*, that a union must give 10 days written notice of a strike against such institutions. The 10-day notice, according to Congressional Committees sponsoring the legislations,[63] was intended to give them sufficient advance notice of a strike or picketing to permit timely arrangements for continuity of patient care.

In this case, the Unions on March 14 and 15 sent to administrators of 15 of the involved nursing homes[64] and the Federal Mediation and Conciliation Service notices advising that a strike would occur at those facilities on March 29. It is conceded that those notices fully comply with Section 8(g).

On March 27, however, other letters were sent to the same addressees advising that the Unions had extended the strike deadline by 72 hours, from 7:00 a.m. March 29 to 6:00 a.m. Monday, April 1. Respondents contend that the extension of the strike notices does not comply with "clear and unambiguous language" in the

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[63] S. Rept 93-766, 93d Cong., 2d Sess. at 4; H. Rept. 93-1051, 93d Cong., 2d Sess. at 5.

[64] Monroeville, Clarion, Fayette, Franklin, Haida, Meadville, Meyersdale, Mt. Lebanon, Murray, Richland, William Penn, Reading, Lancaster, Caledonia and Carpenter.

concluding sentence of Section 8(g), to wit: "The notice, once given, may be extended by the written agreement of both parties." Since, admittedly, the Unions' action in extending the deadline was taken unilaterally, Respondent's argue that the subsequent 3-day strike commencing on April 1 was unlawful and, consequently, that they were under no constraint to take back the approximate 450 employees who participated—even assuming the strike was in protest against unfair labor practices.

That precise issue was presented and resolved in the "*Bio-Medical*" case, *Greater New Orleans Artificial Kidney Center*. 240 NLRB 432 (1979). There the Board, after citing the following language in the Congressional Committee Reports:[65]

> It is not the intention of the Committee that a labor organization shall be required to commence a strike or picketing at the precise time specified in the notice; on the other hand, it would be inconsistent with the Committee's intent if a labor organization failed to act within a reasonable time after the time specified in the notice. Thus, it would be unreasonable, in the Committee's judgment, if a strike or picketing commenced more than 72 hours after the time specified in the notice. In addition, since the purpose of the notice is to give a health care institution advance notice of the actual commencement of a strike or picketing, if a labor organization does not strike at the time specified in the notice, at least 12 hours notice should be given of the actual time for commencement of the action . . .

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[65] *Ibid*, fn. 63.

went on to adopt the 72-hour window and 12-hour advance notice rule as a parameter for allowing extensions of strike times previously announced in notices issued under Section 8(g). In this regard, it held that the rule established a reasonable "substantial compliance" standard needed to avoid an application of Section 8(g) that would produce "an unwarrantedly harsh result [i.e. depriving strikers of protected status] not intended by the Congress."

The *Bio-Medical* precedent has been uniformly followed by the Board since 1979. *District 1199-E National Union of Hospital and Health Care Employees (Federal Hill Nursing Center, Inc.)*, 243 NLRB 23 (1979); *Bricklayers & Allied Craftsmen, (Lake Shore Hospital)*, 252 NLRB 252 (1980); *Nurses Ana (City of Hope)*, 315 NLRB 468 (1994).

In light of the clear and consistent precedent set by *Bio-Medical* and its progeny, any change of interpretation in this area is matter for Board determination; and Respondents' recourse is at that level. *Iowa Beef Packers, supra.* Applying existing policy, I find that the extensions of the strike notices satisfied the requirements of Section 8(g).

VIII. Nature of the Strike

At each of the 15 homes that experienced a strike, issuance of the strike notice and the decision to strike were put to separate votes at meetings conducted by the Union representatives. At these meetings, the Union representatives enumerated the various perceived unfair labor practices at the facility, and in many cases, apprised the members of similar unfair labor practices occurring at other facilities as well. The Union representatives clearly informed the bargaining

unit members that the vote was being undertaken to protest Respondents' unfair labor practices. It was made clear to members that the strike was not in furtherance of the Unions' demands in contract negotiations. The testimony of the Union representatives conducting the meetings at each facility as well as the testimony of corroborating employee witnesses attending meetings at each facility is consistent and credible. It clearly establishes that the employees voted to strike in protest against persistent and numerous unfair labor practices which, on this record are shown to have occurred at each of the 15 facilities.

Further, in addition to striking over Respondent's unfair labor practices in their own facilities, the employees struck in sympathy over unfair labor practices at the 5 other facilities operated by Respondents. That aspect of the strike is also protected under the Act. *C. K. Smith & Co., Inc.*, 227 NLRB 1061, 1072 (1977), enf'd. 569 F.2d 162, 165-166 (1st Cir. 1977).

Respondents were well aware the strikers were protesting unfair labor practices. In their notices, the Unions characterized the strike as an unfair labor practice strike; and through picket signs and public statements, the Unions and striking employees amply conveyed that they were engaged in an unfair labor practice strike.[66]

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[66] The local Unions had supported a "Dignity" campaign that made general contract demands for all nursing home workers in Pennsylvania, including those employed at Respondent facilities as well as other facilities owned by entities unrelated to Respondent. Literature and T-shirts supporting the Dignity campaign had the logo "one contract, one fight." The fact that some Union members wore such T-shirts to Union meetings or even on the picket line,

It is well settled that a strike is considered to be an unfair labor practice strike as long as one of its objectives is to protest unfair labor practices. *Kosher Plaza Supermarket*, 313 NLRB 74, 88 (1993); *R & H Coal Co.*, 309 NLRB 28 (1992); *Northern Wire Corp.*, 291 NLRB 727, fn. 4 (1988), enfd. 887 F.2d 1313 (7th Cir. 1989). This being the case, the fact that frustration over the slow progress of contract negotiations may have played a part in the strike vote lacks significance.

Having established that that Respondent committed the numerous and diverse unfair labor practices before the strike and, further, that the strike was to protest those unfair labor practices, it follows that Respondents had an obligation under the Act immediately to reinstate the strikers to their former positions upon their unconditional offer to return to work[67] and that their failure to do so constitutes an additional unfair labor practice.[68] *Teledyne Still-Man*, 298 NLRB 982, 985

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albeit under coats, jackets and rain gear, does not transform what was clearly an unfair labor practice strike into an economic strike.

[67] Respondents stipulated there was an unconditional offer to return to work on behalf of every striker. (Tr. 221)

[68] At the conclusion of the strike, about 350 former strikers were completely denied reinstatement and an additional 100 were not reinstated to their former positions at 15 facilities based upon Respondents' claim that it had a right to and did permanently replace the strikers. After the strike, Respondent continued to reinstate former strikers only as positions became available, without regard to placing them in their former classification, department, number of hours or shift. Typically, a former striker was first offered reinstatement as a casual (on call) or part-time employee and only later, if at all, offered a full-time position. As casual or part-time employees, many former strikers lost their health insurance and other contractual benefits. In January 1997, 11 months after the three day strike, 66 former strikers still had not been offered reinstatement in any capacity and 237 former

(1990); *American Gypsum Co.*, 285 NLRB 100 (1987). It is a violation of Section 8(a)(3) of the Act to fail to reinstate such strikers. *Radio Electric Service Co.*, 278 NLRB 531, 535 (1986). See also *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407-408 (3rd Cir.), cert. denied 409 U.S. 850 (1972); *Grondorf, Field, Black & Co.*, 318 NLRB 996 (1995); *Orit Corp.*, 294 NLRB 695, 699 (1989); *Accurate Die Casting Co.*, 292 NLRB 284 (1989).

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Remedy

Having found that the named Respondents have engaged in unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

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Among other things, BHRI and BE-P will be ordered to offer immediate reinstatement to their former jobs all employees who went on strike on April 1 as well as employees (Sharon Proper, Diane McNulty and Sara Sharbaugh) found to have been discriminatorily discharged, and to make them and other employees found to have been wrongfully suspended (Connie Kollar) or otherwise deprived of income, whole for any loss of wages and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950),

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strikers who were not reinstated to the positions they held before the strike. In addition, other former strikers were offered reinstatement to positions that were not their former positions and which were, for various reasons, unacceptable.

plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Because of the Respondents' wide-ranging and persistent misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring them to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

Disposition

On these findings of fact and conclusions of law and on the entire record, I issue the following two recommended Orders[69]

ORDER
(BE-P)

Respondent Beverly Enterprises—Pennsylvania, Inc. (BE-P), of Leesburg, Virginia, its officers, agents, successors, and assigns, at the following nursing homes in Pennsylvania: Beverly Manor of Monroeville, Clarion Care Center, Fayette Health Care (Uniontown), Franklin Care Center (Waynesburg), Grandview Health Care (Oil City), Haida Manor (Hastings), Meadville Care Center, Meyersdale Manor, Richland Manor (Johnstown), Beverly Manor of Reading (Mt./Penn), Caledonia Manor (Fayettsville), Camp Hill Care Center, Carpenter Care Center (Tunkhannock), York Terrace Nursing Center (Pottsville), shall:

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[69] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Failing to reinstate unfair labor practice strikers immediately upon receipt of their unconditional offer to return to work.

(b) Ceasing to allow union representatives access to the above facilities as required under provisions of a collective bargaining agreement.

(c) Ceasing to allow posting of union-related notices on bulletin boards in those facilities as required under provisions of a collective bargaining agreement.

(d) Adopting a health insurance plan for employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(e) Reducing employees' hours of work and overtime opportunities without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(d) Laying off employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(e) Eliminating unit positions and assigning unit work to non-unit employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(f) Requiring employees to work overtime and, for some, eliminating opportunities for voluntary overtime without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(g) Failing to give employees' bargaining representatives adequate prior notice and opportunity for bargaining before changing contractual terms and conditions of employment, including: work schedules and advance posting requirements with respect thereto, absentee policies, the period required for doctor certification of absences for illness, rules relative to vacation scheduling and duration, and job descriptions.

(h) Failing to honor union bargaining requests.

(i) Bypassing appropriate union representative and dealing directly with unit employees.

(j) Failing to comply with union requests for information relevant and necessary for collective bargaining.

(k) Failing to process grievances in a timely manner.

(l) Engaging in and threatening unlawful surveillance of employees' union activities.

(m) Threatening employees with discipline and discharge for supporting unions and for complaining about working conditions.

(n) Threatening to grant wage increases to replacement workers in the event of a strike.

(o) Soliciting and impliedly promising to remedy employee grievances.

(p) Disparaging employees from engaging in the protected concerted action of protesting perceived

unfair working conditions by calling them "assholes and fucking idiots."

(q) Prohibiting employees from leaving union literature in the breakroom and prematurely removing it therefrom and from selling union insignia at offduty times in the breakroom.

(r) Suspending employee Connie Kollar for urging other employees to support the union.

(s) Changing the job description of unionized Licensed Practical Nurses (LPNs) without affording to their bargaining representative adequate prior notice and opportunity for bargaining, and for discriminatory reasons.

(t) Refusing to respond to an information request of the union relative to the changes in LPN status and refusing to bargain and dealing directly with LPNs about the changes.

(u) Changing LPN work and vacation schedules without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(v) Refusing to allow a duly selected employee union representative to attend an [*sic*] a labor-management meeting.

(w) Reducing the working hours of employee Beverly Higbee for engaging in union activities.

(x) Discharging LPNs Sharon Proper, Diane McNulty and Sara Sharbaugh for actively supporting unionization and to deter others from doing so.

(y) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer full reinstatement to their former jobs Sharon Proper, Diane McNulty and Sara Sharbaugh as well as all employees who participated in the unfair labor practice strike which commenced on April 1, 1996 without prejudice to their seniority or any other rights or privileges previously enjoyed; and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the Remedy section of the decision.

(b) On request, rescind all unilateral actions here found to have been effected in violation of collective bargaining obligations and make any employee adversely affected by those actions, or by unlawful discriminations, whole for any loss of earnings and other benefits suffered as a result thereof in the manner set forth in the Remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and the suspension of Connie Kollar and within 3 days thereafter notify the employees in writing that this has been done and that the discharges/ suspension will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examina-

tion and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at the nursing homes named above copies of the attached notice marked "Appendix."[70] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found in relation to this Respondent

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[70] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Issues concerning whether remedies should extend to any or all of the interrelated Beverly companies, including Respondents BHRI and BE-P, because of asserted common responsibility for the unfair labor practices, are hereby severed and reserved for resolution by me in a separate supplemental proceeding.

ORDER
(BHRI)

Respondent Beverly Health and Rehabilitation Services, Inc. (BHRI), of Ft. Smith, Arkansas, its officers, agents, successors, and assigns, at the following nursing homes in Pennsylvania: Mt. Lebanon Manor, Murray Manor (Murrysville), William Penn (Lewistown), Beverly Manor of Lancaster, Blue Ridge Haven Convalescent Center (Camp Hill), and Stroud Manor (Stroudsburg), shall:

1. Cease and desist from

(a) Failing to reinstate unfair labor practice strikers immediately upon receipt of their unconditional offer to return to work.

(b) Ceasing to allow union representatives access to the above facilities as required under provisions of a collective bargaining agreement.

(c) Ceasing to allow posting of union-related notices on bulletin boards in those facilities as required under provisions of a collective bargaining agreement.

(d) Laying off employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(e) Reducing employees' hours of work and overtime opportunities without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(f) Requiring employees to return home and retrieve their identification badges before permitting them to work without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(g) Eliminating unit positions and assigning unit work to non-unit employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(h) Engaging in unlawful surveillance of employees' union activities.

(i) Changing the break schedule of union supporters to inhibit their ability to engage in union related activities at the facilities.

(j) Coercively soliciting employees to resign from union membership, interrogating them about their willingness to strike, and threatening them with reduced hours if they did so.

(k) Reducing employees' hours to discourage them from continuing to support the union.

(l) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer all employees who participated in the unfair labor practice strike which commenced on April 1, 1996 full reinstatement to their former jobs without prejudice to their seniority or any rights or privileges previously enjoyed; and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them in the manner set forth in the remedy section of the decision.

(b) On request, rescind all unilateral actions here found to have been effected in violation of collective bargaining obligations and make any employee adversely affected by those actions, or by unlawful discriminations, whole for any loss of earnings and other benefits suffered as a result thereof in the manner set forth in the Remedy section of the decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at the nursing homes named above copies of the attached notice marked "Appendix."[71] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's

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[71] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found in relation to this Respondent

Issues concerning whether remedies should extend to any or all of the interrelated Beverly companies, including Respondents BHRI and BE-P, because of asserted common responsibility for the unfair labor practices, are hereby severed and reserved for resolution by me in a separate supplemental proceeding.

Dated, Washington, D.C. November 26, 1997

/s/ ROBERT T. WALLACE
ROBERT T. WALLACE
Administrative Law Judge